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Youngstown: Pages from the Book of Disquietude

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This essay is dedicated to Lloyd N. Cutler

INTRODUCTION

The *Youngstown* holding is widely admired. One reads with pride those passages in which the Supreme Court denies to a president with whom they are in considerable political sympathy the power to enlarge executive authority by militarizing the homeland. And yet one wonders, as we confront in the 21st century a lethal foreign enemy who has demonstrated the ability to infiltrate and assault the domestic environment, precisely what restraints ought to govern a presidential response to that enemy.

PART ONE: A MODAL ANALYSIS OF THE *YOUNGSTOWN* CASE

I. THE FORMS OF ARGUMENT

It is customary among certain theorists to say that there are six forms of argument that supply the rationales for constructions of the constitutional law of the United States. These forms are called the *historical* (relying on the intentions of the framers and ratifiers of the constitutional provision to be construed), *textual* (looking to the meaning of the words of the provision alone, as these would be interpreted by the average man in the street today), *structural* (inferring rules from the relationships that the Constitution as a whole mandates among the various structures it sets up), *prudential* (seeking to balance the costs and benefits

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of a particular rule, especially regarding those risks borne by the deciding Constitutional institution), *doctrinal* (applying rules generated by the precedents that guide a particular constitutional institution) and *ethical* (deriving rules from the commitments to human rights proclaimed in the Declaration of Independence and the powers to protect those rights reflected in the Constitution).[1]

Sometimes these archetypal forms function as *modalities* of constitutional law; that is, they make up the ways in which the truth or falsity of a legal proposition is determined, though they are neither true nor false in themselves. There is some debate as to whether there is a hierarchy among these modalities; my own view is that there is not. They are, I would say, incommensurable but not incomparable.[2]

When the rationale for a constitutional decision such as is given in a judicial opinion is described in terms of the modalities employed, it is sometimes said to be the product of *modal analysis*.

II. MODAL ANALYSIS

Modal analysis calls into question the assumption that justification legitimates law. Many movements and many volumes have been founded on this unquestioned assumption, such as, for example, the notorious pseudo-question called the "Countermajoritarian Objection" which depends upon the alleged deficit in the legitimacy of judicial review that is attributed to its nonconformity with majoritian practices. A good deal of constitutional commentary is an effort to produce justifications for particular holdings or non-judicial decisions on the grounds that such governmental actions lack legitimacy in the absence of non-legal, extra-modal justifications. The increasing irrelevance of, for example, the annual *Forewords* to the *Harvard Law Review*—or indeed of law reviews and law journals generally—may in part be laid at the door of the unthinking pursuit of this objective.

Casting off from this assumption permits us to abandon also the idea that the rationale for a decision is—or should be—a recapitulation of the reasons why the decision was reached in the first place. If judicial opinions, for example, are legitimated by

1. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford U. Press, 1982).

2. Philip Bobbitt, *Constitutional Interpretation* (Blackwell Publishers, 1991).

certain conventional argumentative practices, then the rationale is an effort to provide guidance for future legitimating occasions—future rationales for future decisions—and not a kind of talking cure for judicial neuroses.

Modal analysis does away with the allegedly fundamental characterization of law as an epiphenomenon, a symptom of extra-legal relations, and replaces this characterization with a description of law as a discrete social activity, no more or less fundamental than other activities that it both shapes and takes shape from. Thus modal analysis is an implicit attack on Legal Realism no less than Marxism; such analysis treats the insights of the former as the disturbing answers to irrelevant questions ("why did the judge decide as he did?"), and the dialectic of the latter as a circular privileging of certain social phenomena—including Marxism itself—over others leading, as circular hierarchies do, to an endless regress. For similar reasons, modal analysis is no more sympathetic to Formalism or McCloskeyan democratic theory. Legitimation does not depend upon the correspondence between behavior and theory; that is, it does not depend upon justification.

III. THE SUPREME COURT OPINIONS

Revisiting *Youngstown Sheet and Tube v. Sawyer*[3] provides an excellent opportunity to undertake a modal analysis because the various Supreme Court opinions in that case provide modal exemplars of a remarkable purity of form. If the *style* of a particular judge, as well as the different notions of style in particular eras, can be explained as a preference for one type of argument over others, then *Youngstown* presents a stylistic display of unusual clarity and beauty, as we shall see. Three great judges with sharply etched styles (Black/textual, Frankfurter/prudential, Jackson/structural) are joined by three other judges whose opinions are scarcely less severe in their adherence to particular constitutional modalities (Douglas/prudential, Clark/doctrinal, Vinson *et alia*/historical and ethical.)

THE BLACK OPINION

The opinion for the majority is written by Justice Black.[4] It can be summarized as follows: the President is empowered by

3. 343 U.S. 579 (1951).
4. Id. at 582.

the Constitutional text to execute laws; there is no executive power in the text of the Constitution that authorizes the Executive to legislate laws; therefore only action by Congress or a constitutional provision can supply the necessary precondition to executive action; there is no statutory or explicit constitutional basis for conscripting the assets of the steel industry; thus the President's action is unlawful because it is unauthorized.[5]

The textual approach that pervades this opinion can be conveyed by a few excerpts:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied . . . .
>
> [Therefore i]t is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. . . . [The Government relies] on provisions in Article II which say that "[t]he executive [p]ower shall be vested in a President". . .; that "he shall take [c]are that the [l]aws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."
>
> The order cannot be properly sustained as an exercise of the President's military power as Commander in Chief [despite cases upholding broad powers in a theatre of war.] Such cases need not concern us here . . . .
>
> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. . . . [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . .
>
> . . . .
>
> It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true,

5. Id. at 582-89.

> Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government."[6]

The unusual characteristics of this opinion—its disdain for precedent, its utter lack of any expression of concern for the practical consequences of permitting the *Youngstown* strike to continue in wartime, its extravagant reading of the necessary and proper clause so at odds with the structural rendering in *McCulloch*, and, most characteristically, its syntactical reliance on the implication that the phrase "faithfully execute the law" requires legislation that must come from another's hand--all derive from a textual approach to constitutional construction. Any precedent that is inconsistent with the text is a mistake; that there is a long line of mistakes is hardly a persuasive rationale for perpetuating their holdings. Nor do appeals to prudence fare any better under this approach. The text alone is in the hands of the People; if they wish to run mortal risks by refusing to amend that text, what right does a judge have to reverse their judgment?

We should not be misled by rhetorical feints in the direction of structural argument such as the phrase, "In the framework of our Constitution," because this flourish only serves to introduce the textual argument that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[7] Similarly, though Justice Black writes that "we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property,"[8] the only reason given for this assertion is that, "This is a job for the Nation's lawmakers, not for its military authorities."

Opinions like this used to drive Justice Frankfurter wild (and madden a good many other law professors who taught or had taught at the Harvard Law School). The rejection of practicality seemed to them either reckless or disingenuous, or both. What is the craft in the argument just given? Why exactly is this "a job for the Nation's lawmakers" and not for its military authorities? And yet Black's opinion does capture rather well the attitude one would expect from the great mass of our people at that time: slightly uncertain as to the constitutional basis for war

6. Id. at 585-88.
7. Id. at 587.
8. *Youngstown Co Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1951).

in Korea, apprehensive about any sudden or untoward changes in the relation of the government to private property, and deeply reverent of the Constitutional text and its ability to see us through.

This union of contemporary public opinion and constitutional decisionmaking is what textual argument strives to achieve. Law professors may prefer the Jackson opinion today; but would the public share this preference if, say, to fight terrorism we were faced with a presidential ban on software encryption despite the absence of Congressional action? Wouldn't the public want to fall back on the certainties of the text precisely when security concerns seem especially murky?

Human beings are not the simple product of their experiences, the multiplication result of many "factors." But it is noteworthy that there is no ardent practitioner of textual argument on the U.S. Supreme Court today; is it coincidental that there are also no persons who have ever held high federal elective office, such as Black's Senate seat?

THE JACKSON OPINION

Justice Jackson announces early on in his concurrence that he will be offering a structural argument. In the first paragraph he writes, "The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced structure of our Republic."[9] It is characteristic of this approach that its practitioners often find it necessary to tell us what it is not, particularly as here when prudential argument with which it is often confused is in contention. Indeed much of the Jackson opinion is directed toward fending off other approaches to the constitutional decision at hand.

Thus these sentences:

> Just what our forefathers did envision or would have envisioned had they foreseen modern conditions must be divined from materials as enigmatic as the dreams Joseph was called upon to interpret for Pharoah.[10] (*contra* historical argument)

9. Id. at 634.
10. Id.

> And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.[11] (*contra* doctrinal argument)

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.... I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of at the rigidity dictated by a doctrinaire textualism.... Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.[12] (*contra* textual argument)

> The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted.... We may also suspect that they suspected that emergency powers would tend to kindle emergencies.[13] (*contra* prudential argument)

> The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations.[14] (*contra* ethical argument)

These statements indicate what the basis for the opinion is not; what it is, what it cannot usefully be understood by ignoring, is structural argument, perhaps the most distinguished example in the jurisprudence of the United States Supreme Court since *McCulloch v. Maryland*.[15]

Structural arguments are deceptively simple. They typically depend on three or four steps: an uncontroversial statement derived from an explicit provision about the structure of government (for example, "We have states"); an inference from this structure when it is augmented with the premise that relationships should be so construed as to give the structure the best

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11. Id. at 635.
12. Id. at 635-53.
13. Id. at 649-50.
14. Id. at 646. The one clear expression of an ethical approach ("The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law ") while beautifully rendered, does not form part of the argument and is subordinated to the next sentence ("Our Government is fashioned to fulfill this concept so far as humanly possible") which is structural.
15. 17 U.S. (4 Wheat.) 316 (1819).

chance of success ("There must be one thing that states can do that is not determined by the federal government"); a practical assertion about how this inference manifests itself ("Controlling a state's budget is a power such that if it were in the hands of the federal government states would as a practical matter cease to exist *qua* states"); a conclusion that addresses the case at hand ("Whether the institutional relationships promulgated by the Constitution require or are incompatible with or are irrelevant to the question: Can the Congress pass a statute that significantly impairs the budgetary discretion of states?"[16]). Thus structural approaches often blend text (step 1), history (step 2), and prudence (step 3) to create a new archetype—the structural modality.[17]

Justice Jackson's argument may be summarized as follows: 1. The Constitution provides for an Executive power; 2. It was intended that practice would integrate the dispersed powers of government into a workable set of relationships; 3. Grouping practical situations in which a President may doubt, or others may challenge, the exercise of Executive power depends on this factor of relativity among the branches.[18] Thus, the President's authority is at its maximum when Congress has authorized his acts; his authority is less when he must rely on whatever inherent power he possesses in concurrence with the Congress and Congress has not spoken on the matter at hand; his authority is least when he must claim that it is exclusive because Congress has acted contrary to his own acts. On this basis, Jackson concludes that, because the Congress has explicitly refused to provide the power exercised here, the President must demonstrate that his power is both inherent and preclusive.[19] That is part One of the opinion.

The Second part examines the various bases on which such a claim can be pressed. First, there are the provisions in Article II that the "executive power be vested in a President" (the so-

16. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976)

17. Nor do single modalities retain their character when used in new decisional contexts. Thus, as we shall see, arguments that compose precedents for the Executive, for example, can become the basis of ethical arguments when those precedents are analyzed and applied by judges; prudential arguments by the framers in *The Federalist* became structural arguments for decision-makers following ratification; and all the other five forms become doctrine when they are adopted by an authoritative court as the rationales for decisions.

18. *Youngstown Co. Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1951).

19. Id. at 640.

called "stewardship" theory of the presidency[20]) and that the president be Commander in Chief of the Army and the Navy, and that the president take care that the laws be faithfully executed. These of course are the same three bases for the president's authority addressed by Justice Black, but notice how different the attack on them is when it comes from Jackson. Having set up the question in structural terms—the "relativity" as Jackson puts it of presidential authority, i.e., its relational nature *vis-à-vis* the Congress—he gives structural answers.

The mere location of executive power in the presidency cannot also create power; if it did there would be no point in explicitly providing, as the Constitution does[21], that the President can require the written opinions of his cabinet, a matter that "would seem to be inherent in the Executive if anything is."[22] Similarly, if the president, whose control over foreign affairs is largely plenary, could bootstrap his primacy in that sphere into an enlarged domestic role, then the relation between the executive and the other branches would be altered. "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."[23]

Finally, Jackson invokes the fundamental structure of the government, limited sovereignty—and the relation between human rights and government power—to refute the notion that the "laws" to be faithfully tended convey, but do not restrict, presidential authority. The third basis on which the Solicitor General had relied is that the president "shall take care that the Laws be faithfully executed."[24]

> That authority must be matched against the words of the Fifth Amendment that 'No person shall be deprived of life, liberty, or property without due process of law.' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a

20. Which holds that "the executive is subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service." Theodore Roosevelt, *An Autobiography* 378 (MacMillan Co., 1916).

21. U.S. Const., Art. II, § 3.

22. *Youngstown*, 343 U.S. at 579 (footnote 9).

23. Id. at 646.

24. Id.

> government of laws, not of men, and that we submit ourselves to rulers only if under rules.[25]

Most interestingly, Jackson takes up the numerous cases in which many presidents have acted in the absence of Congressional authority and here too provides a structural response. That response is his comparative description of the structures of other constitutional systems. Notice carefully that Jackson emphasizes that this is not a prudential argument:

> This contemporary foreign experience may be inconclusive as to the *wisdom* of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.[26]

Finally, Jackson's concluding lines in the opinion stress the structural role of the court in judicial review:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[27]

THE FRANKFURTER OPINION

Frankfurter's prudential opinion too begins with an attack on the textualism of the majority opinion: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." But unlike Jackson, Frankfurter prefers to acknowledge rather than distinguish the other competing forms of constitutional argument and then, rather subtly, transmute each into a prudential argument.

For example, historical argument:

> The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective

25. Id.
26. Id. at 652 (emphasis supplied).
27. Id. at 655.

> power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed... [Thus] our democracy implies the reign of reason on the most extensive scale;[28]

Or structural argument:

> To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy;[29]

or even ethos:

> No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments.... The price was deemed not too high in view of the safeguards which these restrictions afford.[30]

In each of these passages the standard form ("the Founders thought that...") gives way to a prudential turn ("the Founders knew from experience, which taught them that..."); or "our structure of separated powers" becomes "a matter of felt necessity" and our protection of human rights when measured against the costs to efficiency is not a bad bargain, and so on.

The core of Frankfurter's affirmative argument, too, is prudential. Brandeis is quoted to great effect; Marshall's admonition that we should never forget that "it is a constitution we are expounding," without which no ambitious prudential opinion is complete, is introduced (twice); the prudential role of the court in deciding this matter is given attention to the same degree that it is ignored in the majority's opinion.[31]

Frankfurter begins with this assertion: "It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal leg-

28. *Youngstown*, 343 U.S. at 593.
29. Id.
30. Id. at 613.
31. Id. at 589-614.

islation."[32] But why is that? After all, Jackson bases his analysis on precisely such an assertion by the Executive. The reason is to be found—and perhaps can only be appreciated from a modal point of view—in this passage in which Frankfurter introduces, very indirectly, "the Government's argument that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure"[33]:

> "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.[34]

It is crucial to remember that prudential argument entered the arsenal of available modalities of legitimation only in the 20th century with the *Ashwander* rules by Brandeis (tellingly referred to by Frankfurter early in his concurrence in *Youngstown*.) Having defined the perspective from which prudentialism is to operate—judicial self-protection—the rest of the pieces fall into place. A clumsy prudentialism like that of the Burton concurrence ("We find no such power available to [the president] under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack") gives way, in Frankfurter's hands, to a far more careful, nuanced prudential treatment of great finesse ("In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General"[35]). The fact that Burton is unlikely to know, much less appreciate, the complexities of military risk in Korea does not also embarrass Frankfurter because he is in the position of deferring to those authorities who do appreciate those risks.

THE CLARK OPINION

Whereas Frankfurter begins his opinion with the familiar words of Marshall in *McCulloch*, Justice Clark begins with the obscure Marshall opinion in *Little v. Bareme*. There the Court decided a case arising from the United States' first war, the war

32. Id. at 602.
33. Id. at 609.
34. *Youngstown Co Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609-10 (1951).
35. Id. at 613.

with France, a conflict as little known to Americans today as is the case itself. That war, like the war in Korea, was fought without benefit of a declaration of war, a fact that should give some pause to those who think they have an unshakeable picture of the framers' and ratifiers' requirements on this matter. The war with France was prosecuted by Adams pursuant to six statutes; one of these created the American navy; one provided authority to seize vessels on the high seas bound for a French port. The difficulty arose when the president issued instructions that embraced other vessels, one of which, the "Flying Fish" was bound from (not to) a French harbor. Acknowledging that the president might very well have the authority to empower officers of the United States to seize such vessels in the absence of statutory authority, relying alone on his inherent powers, the Court nevertheless unanimously held that the instructions were unlawful in the face of adverse Congressional authorization. Justice Clark clearly marks his opinion as relying on the doctrinal modality when he writes, having summarized *Little*,

> I know of no subsequent holding of this Court to the contrary.... In my view—taught me not only by the decision of Chief Justice Marshall in *Little v. Bareme* but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national emergency.... I cannot sustain the seizure in question because here, as in *Little v. Bareme* Congress had prescribed methods to be followed by the President in meeting the emergency at hand.[36]

Not surprisingly Clark closes his opinion with a quotation from Justice Story, one of our greatest doctrinal jurists, about the responsibility of the judge to render decisions "however [they] may differ from that of very great authorities."[37] No passive virtues here.

THE DISSENT

Chief Justice Vinson, joined by Justices Reed and Minton, saw the legislative issue rather differently. For the dissenters—which included a former six-term member of the House—it simply wasn't a question of the president acting in defiance of Congressional action. Instead, it seemed to them that Congress had

36. Id. at 660-62.
37. Id. at 667.

failed to act—repeatedly—and was unable to act decisively owing to the political context of divided government[38] in which it found itself. Had the Congress actually passed a statute forbidding the president from seizing assets, the dissenters would have reached a different judgment. If Congress in fact opposed the seizure, it was free through statute or joint resolution to say so (and take the political heat). Simply refusing to write into law the action taken by the president was not sufficient to allow the inference that this action was in defiance of their wishes.[39]

This view of the matter opened up the case to an historical approach for, contrary to the received wisdom today, the framers did anticipate party divisions and had a good deal to say about how to make government work in such conditions. Here it is necessary to emphasize once more the importance of *The Federalist Papers* to the enterprise of historical argument.

It was the role of the *Papers* in ratification, principally in the crucial state of New York but also that of *Federalist* ideas elsewhere,[40] that gave them the canonical status they now enjoy as the principal interpretive resource for historical argument. That is because these ideas were the "advertising" the ratifiers were given as to the purposes of the Constitution and thus are the best guide we have to the ratifiers' intentions in adopting that constitution. And it is the ratifiers intentions, not the framers', that have legal consequence because the ratifiers were the legal instruments of the People's sovereignty. To employ a homely legal metaphor: the constitution is like a trust agreement, endowed by a testator. Its drafters, the framers, were only the lawyers who drew up the agreement. It is the ratifiers alone who were empowered to give it legal significance because they, the testa-

38. The Democrats had held the White House since 1932; the Republicans had recently swept both houses of Congress.

39. Following the issuance of the Executive Order, "twelve days passed without action by Congress. On April 21, 1952, the President sent a letter to the President of the Senate in which he again described the purpose and need for his action and again stated his position that 'The Congress can, if it wishes, reject the course of action I have followed in this matter.' Congress has not so acted at this date." *Youngstown Co Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 677 (1951) (Vinson, C.J., dissenting).

40. It is often objected that the *Federalist* essays were not reprinted in all the states, nor were consulted by all the members of the ratifying conventions, and thus have no authoritative interpretive status in historical argument. This objection misses the point entirely; it is not that the *Papers* were an original contribution by great figures that entitles them to be given constitutional weight. See, e.g., David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 Minn. L. Rev. 755 (2001). It is rather that they express ideas in circulation at the time—elegantly in the *Papers*, less so perhaps elsewhere—and were not original that makes them so valuable.

tors as it were, endowed the document with authority. *The Federalist* tells us what the lawyers told their clients the latter were agreeing to when they gave their consent to the document. For this reason *The Federalist* has been, as Marshall wrote in *McCulloch*, "justly supposed to be entitled to great respect [by those] expounding the constitution."[41]

Quoting from *Federalist 48* and *70*, Vinson wrote,

> Only by instilling initiative and vigor in all of the three departments of Government, declared Madison, could tyranny in any form be avoided. Hamilton added, 'Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attack; it is not less essential to the steady administration of the laws.'[42]

Rejecting a prudential approach[43], Vinson wrote that

> [W]e are not called upon today to expand the Constitution to meet a new situation. For, in this case, we need only look to history and time-honored principles of constitutional law.... Executive inaction in such a situation, courting national disaster, is foreign to the concept of energy and initiative in the Executive as created by the Founding Fathers... The Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness. There is no cause to fear Executive tyranny so long as...the Executive acts, as he did in this case, only to save the situation until Congress could act.[44]

Vinson's use of the *Federalist*, and his reliance on acts by Washington, John Adams and John Marshall (while he was a Congressmen) are typical of historical constitutional argument. It is assumed that the framers' acts possess a constitutional salience not because they issued from the framers but because these acts occurred before an audience of, and were themselves wrought by, ratifiers. But the same cannot be said for evidence of presidential action by Cleveland, or Lincoln or Taft. What role as constitutional argument do these references play?

It is tempting to conclude that these are prudential arguments, partly because they address past crises (and thus provide

41. *McCulloch*, 17 U.S. (4Wheat.) at 433.
42. *Youngstown*, 343 U.S. at 682
43. As examples of such an approach the dissent quite appropriately cites *United States* v. *Classic* and *Home Building & Loan Ass'n* v. *Blaisdell.*
44. *Youngstown*, 343 U.S. at 683, 703-04.

a practical guide to dealing with emergencies), and partly because the pattern they describe fits Bickel's celebrated description of the prudential position: "The accomplished fact, affairs and interests that have formed around it, and perhaps popular acceptance of it—these are elements . . . that may properly enter into the . . . shaping of the judgment."[45] But the type of constitutional argument is determined not by *definition* but by *use*, and here Vinson is using these incidents to establish a tradition of presidential leadership in times of crisis. This strikes me as essentially an ethical claim[46]—that is, one rooted in the Declaration of Independence's ethos of limited government which presumes that all residual authority belongs in the private sphere. I take Vinson to be arguing that the private arrangements of production and wage bargaining are qualified by the obligation of government to secure the rights of its citizens. This element of the constitutional ethos is established, as is customary, by looking at the habits of our people as much as of our government, and it is the habitual to which Vinson turns. His argument may be summarized as: The framers and ratifiers intended that the Executive be permitted to act in certain emergencies subject to ratification of these acts by Congress; subsequent history discloses many examples of this kind of presidential action, which has been widely accepted by our People and our institutions.

IV. THE DISCREET CHARM OF MODAL ANALYSIS

I have written elsewhere about the advantages I believe accompany modal analysis and my preference for this sort of description over others. Not the least of my reasons is that modal analyses do not claim to explain anything; they do not tell us why a decision came out the way it did, they do not predict future voting patterns, they make no pretension to necessity, even to cause-and-effect. Does that mean they are not very helpful in dealing with future problems? In Part Two of this paper I will construct scenarios about the future in which a president con-

45. Alexander M. Bickel, *The Least Dangerous Branch* 116 (Bobbs-Merrill, 1962).

46. Though there are prudential elements in the opinion ("On [the majority's] view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action") that supplement its primary historical approach, the distinction may be assessed this way: does the dissent cite the historical record as proof of the wisdom of presidential intervention or as evidence that it has, for better or worse, occurred and been accepted as legitimate? Constitutional decisions that were made by the president on a prudential basis—like Lincoln's suspension of habeas corpus—can be used subsequently as doctrine by future presidents or ethos by judges.

fronts a problem not very dissimilar to that which led to *Youngstown.* I will suggest how different modal approaches might resolve that problem. One hopes that this exercise could help a future president and thus guide his constitutional decisionmaking in advance of a future court's decision. This is one of the important contributions of modal analysis: it enables decisionmakers to analyze constitutional problems in the absence of a court's decision. Thus, unlike so much constitutional theory, it is available to persons whose convictions differ from that of the theorist's, and to institutions that have interests different from those of courts.

PART TWO: SCENARIO PLANNING FOR A CONSTITUTIONAL CRISIS

I. SCENARIO PLANNING AS ANTICIPATORY PRECEDENT

Hypotheticals are a staple of law teaching. The slight change in facts that, thaumatrope-like, shifts the perception is a crucial art form for anyone who desires to escape the impress of dogma and see a problem (and an answer) in the round. Before the transition in the constitutional order from nation-state to market state,[47] of which September 11th, 2001 was both a menacing harbinger and a lethal reminder, coping with the constitutional future of the State was simply a question of looking ahead, extrapolating from the present. Realizing one's policy objectives was thus a matter of strategic planning. The ACLU and the Federalist Society, the Children's Defense Fund and the Christian Coalition all participated in rather predictable ways; so it was also in the classroom—just consult a few former final exams on file to corroborate this. The timeliest hypotheticals in constitutional criminal procedure had to do with *Miranda* rights, not military tribunals; in foreign relations law there persisted a devolutionary movement to give localities more say in international affairs, not to require of them ethnic profiling and detention on a vast scale in service of an international yet undeclared war; law professors questioned whether the ABM Treaty could be renounced, not whether the UN and NATO could be silently superceded by *ad hoc* "coalitions of the willing." Faith-based so-

47. Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Alfred A. Knopf, 2002).

cial initiatives were debated for their First Amendment problems; no one suggested rounding up lists of persons who attended a particular mosque.

Then quite abruptly, no one really had a vision of the future because the future was going to be so unlike the past. We suddenly needed to approach the future with an acceptance that simple forecasting was not going to be useful to us for a while, that no one had any clear view of what was coming and therefore no one could offer a realistic vision for the future. Instead we had to sharpen our skills at imagining different futures so that we had some idea of what was at stake when the choices the future would present us with were actually upon us. To say this is to contrast "strategic planning" with "scenario planning." Both rely on intelligence estimates that are based on the careful analysis of immense amounts of information, sorting out the true from the false, assigning probabilities to information that might be either true or false, guessing what the future will be like if all the relevant facts were available to the analyst.[48] No one has grasped this better than Joseph Nye, the Dean of the Kennedy School at Harvard, who wrote:

> Greater complexity in the structure of power means greater uncertainty in estimating the future. Polities often undergo dramatic, nonlinear change, but such changes have become much more frequent than during the Cold War. In the 1980s, for example, if one were estimating the number of nuclear weapons South Africa would have in the 1990s, one would have calculated what their uranium enrichment plant could produce and answered 'six or seven.' But the correct answer today turns out to be zero because of radical political discontinuities associated with the transition to majority rule and the end of the Cold War. Similarly, if one were to estimate today how many nuclear weapons a country with no nuclear facilities might have in five years, the linear answer would be zero. But that would change if the country were able to purchase stolen nuclear weapons on the transnational black market.[49]

This is precisely the problem. And Nye's recommendation—the construction of alternative scenarios rather than single-point predictions in order not so much to predict the future as to help policymakers think about the future—is precisely the solution. But scenario planning is not widely practiced in gov-

48. Joseph S. Nye, Jr., *Peering into the Future*, 73 Foreign Affairs 82 (July/August 1994).

49. Id. at 87.

ernments or classrooms—as opposed to corporations—and it is easily confused with strategic planning.

Scenario planning relies on the creation of hypothetical, alternative stories about the future that share certain factual assumptions but differ based on decisions made within each scenario; strategic planning is a formalized procedure that aims to produce an integrated system of decisions based on predetermined goals. That is, strategic planning assumes an answer to the question that scenario planning poses: what sort of future do we want? The time horizon for scenario planning is typically from 5 to more than 25 years; strategic plans usually go no further out than 1 to 3 years. Inputs to scenario planning are more qualitative, i.e., they share certain factual estimates about the future but emphasize economic, technological, resource and cultural trends. Inputs to strategic planning tend to be more quantitative, looking to past performance, forecasts and probabilities. Thus scenario planning exploits uncertainties, in order to allow the creation of alternative futures; strategic planning attempts to minimize uncertainty. The results of scenario planning are multiple, alternative outcomes versus the quantified single outcome based on the likeliest scenario that is the result of strategic planning.[50]

The difficulty with implementing Nye's proposed solution is that such scenario construction depends upon a dialogue with decisionmakers at many levels in order to create a culture that is sensitive to the implications of change and alert to opportunities to create favorable conditions for change. Members of this culture produce the raw material on which scenarios are based; intensive briefings with them, once the scenarios are written, are as important to the process as the written product. But the judges, presidents and their senior subordinates, and other key constitutional actors seldom spend the time together necessary to bring such a culture into being. High-impact but low-probability contingencies, which are crucial to the imaginative dialogue of the scenario process, are of little interest to busy politicians, law professors and judges. Competing scenarios, in the absence of a cul-

50. See *Scenario Planning: Forging a Link with Strategic Decision Making* 51 (Corporate Executive Board, 1999); Arie de Geus, *The Living Company* (Harvard Business School Press, 1997); David H. Mason, *Scenario-Based Planning Decision Model for the Learning Organization*, 22 Planning Review (March/April 1994); Ian Wilson, *The Effective Implementation of Scenario Planning: Changing the Corporate Culture*, in Liam Fahey and Robert H. Randall, eds., *Learning from the Future: Competitive Foresight Scenarios* 352 (John Wiley & Sons, 1998).

ture of dialogue animated by a sense of rapport are liable to degenerate into political sermons in the classroom or in the media in which the "future" turns out to support the policy preferences of the author.

Things are easier for the business corporation. In the early 1970s Royal Dutch Shell had been regarded as the weakest of the great multinational oil companies, known as the "Seven Sisters." At that time Shell began a series of "scenario" studies that are credited with assisting that corporation's remarkable rise since then. As early as 1972, one of Shell scenarios envisaged the formation of OPEC and the sudden rise in oil prices that hit the world in the winter of 1973-74; and a subsequent scenario correctly described the equally dramatic drop in oil prices that began in early 1986. In 1984, a Shell scenario (called "The Greening of Russia") described the possible break-up of the Soviet Union and the ensuing chaotic conditions in Eastern Europe. But to depict these descriptions, which turned out to be accurate, as validating the scenario process themselves is to misunderstand its significance completely. After all, if a corporation is doing more than one "estimate" it will often be able to predict a rise (or fall) that turns out to be true. Rather the scenario process made some futures appear less plausible that had more or less been taken for granted, and it prepared managers to look for signs of otherwise unexpected futures. In the absence of this preparation, managers would be inclined to shoe-horn events into their settled expectations or ignore altogether outlying facts.

Since Shell's highly publicized success with scenario planning in the 1970s and 1980s, many corporations have attempted to employ this tool with the hope of achieving similar dramatic results. The Corporate Executive Board reports, however, that there has been some disillusion with the scenario planning process as a result. "Perhaps the single greatest driver of this dissatisfaction," the Board has concluded, "is a widely held yet misguided expectation that scenario planning readily and directly improves strategic decision making; misconceptions rooted in scenario planning's history promote this expectation..."[51] The problem is that Shell's successes are inevitably translated into the results of correctly predicting the future, rather than enabling its decisionmakers to cope better with that future as it, un-

51. Corporate Executive Board, ibid. For an excellent treatment of the scenario process see Peter Schwartz, *The Art of the Long View: Paths to Strategic Insight for Yourself and Your Company* (Doubleday, 1991).

predictably, unfolded. Prepared by their *alternative* scenarios, Shell executives were able to see a pattern in events—a story—that their competitors were forced to analyze as mere noise, a chaotic departure from conventional expectations.

The most important aspect of this process is summed up by Shell as: "[b]y considering alternative futures, we begin to see that the future is shaped not only by the past but by what we think is possible and by the choices we make."[52]

Using the following hypothetical, I will generate six scenarios—six opinions derived from the dominant modal approaches in *Youngstown* and six possible worlds that occur in their aftermaths.

II. THE SETTING

[This establishes the factual parameters with which the various scenarios must cope.[53]]

On April 1, 2004 the President returns to Austin, Texas to address the Texas Legislature. His itinerary includes an awards ceremony of local volunteer leaders, an appearance at a magnet school, and a visit to a basketball game.

The FBI has information suggesting a possible threat to the President's party from a terrorist group, but has no specific intelligence on the form of the attack. The group is suspected of having acquired biological pathogens, including anthrax, and of having procured aerosolization equipment. The FBI issues a general threat warning to local law enforcement but does not deem the information serious enough to alert state or municipal health authorities.

April 8: FBI informants report rumors that something happened while the president was in Texas. The Secret Service issues a denial.

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52. *Public Global Scenarios* 1992-2020, 2. . . . "[T]he purpose of scenario planning is not to pinpoint future events but to highlight large-scale forces that push the future in different directions. It's about making these forces visible, so that if they do happen, the planner will at least recognize them. It's about helping make better decisions today. Scenario planning begins by identifying the focal issue or decision. There are an infinite number of stories that we could tell about the future; our purpose is to tell those that matter, that lead to better decisions."

53. This hypothetical is directly derived from Dr. Tara O'Toole, *Smallpox: An Attack Scenario*, 5 Emerging Infectious Diseases Journal, No. 4 Special Issue 540 (July-August 1999) though some changes have been made.

April 12: A 20 year old student goes to the UT infirmary with respiratory distress and muscle aches. She is pale, has a temperature of 102F and is slightly leukopenic but the physical exam and lab results are otherwise normal. She is diagnosed as having flu and is sent home with instructions to drink fluids and take ibuprofen. Later that day a 40 year-old electrician employed by the state arrives at the emergency room of Breckinridge city hospital, manifesting nausea, chest pains and difficulty breathing. He appears pale, and has a temperature of 102F. As his breathing becomes more labored he is put on a ventilator and removed to the intensive care unit; because he has recently returned from a holiday in Belize he is diagnosed as suffering dengue fever and put on the critical list. Over the course of the day, four young adults come to the university infirmary with influenza-like symptoms.

Coincidentally Senate hearings had recently been held on a bill drafted by the Center for Disease Control that would give federal officials the power to act decisively in the event of a biological attack or the outbreak of an infectious disease. Testimony at those hearings asserted that, owing to the development of successful public health measures, inoculations, vaccines, and modern antibiotics the ancient practice of quarantine had largely vanished from 20th century America. Thus despite the emergence in the U.S. of a constitutionally omnicompetent federal government for over fifty years—from Darby *to* Lopez*—this period of the high-water mark of federal power did not witness any attempt to pass legislation that would give the federal government quarantine authority. The proposed Emergency Health Powers Act would permit federal officials to compel a person to submit to a physical exam or a test without a court order. Physicians and other health workers could be forced to do this testing. While court orders would be required for quarantines, officials could quarantine first and go to court afterwards. Federal officials could compel persons to be vaccinated or treated for infectious and non-infectious diseases. The U.S. government would have broad emergency powers to confiscate property and facilities, including subways, hospitals and drug companies.*

As the Easter recess approaches, it appears clear that concerns about civil liberties and federalism have catalyzed opposition to the bill from both the left and the right and that it has little chance of passage. The majority leader shelves the legislation.

April 14: The female student returns to the infirmary after collapsing in class. Though her blood pressure is normal and her temperature has stabilized at 102F, her breathing is strained. That

same day another state employee comes to the municipal emergency room with similar symptoms. Texas state law, however, forbids the sharing of information about an individual's health status without his express consent; as a result, neither physicians in the two hospitals nor public health authorities are made aware of these two simultaneous cases.

In Washington, a member of the President's Secret Service detail is admitted to George Washington hospital where he is diagnosed as suffering from anthrax. He is treated with Ciproxin, a broad-spectrum antibiotic.

April 16: As a result of the Washington diagnosis, CDC alerts hospitals in all cities where the Secret Service agent had traveled in the preceding period during which infection would have manifested; Austin is among these cities. Five new cases present at the university infirmary; two at other hospitals in the city. When both the college infirmary and the city hospitals report similar cases, FBI personnel are dispatched in order to secure biological samples from the patients. Military aircraft flies these samples to CDC's Biosafety Level 4 lab in Atlanta. The FBI requests that Austin city police be called to help maintain order at the infirmary where rumors are circulating of a biological attack on campus. City police at first direct that no patients, staff or visitors will be allowed to leave the hospital until all occupants have been identified and their addresses recorded. More FBI agents and city police arrive on the infirmary grounds.

Hospital visitors are confused and angered by police refusal to allow anyone to leave the hospital. Ambulances are re-routed to other hospitals. The rumor that smallpox has broken out rapidly spreads through the campus, as do rumors that a terrorist wanted by the FBI is in the infirmary. When the FBI attempts to secure the records of the stricken student, city police and hospital officials attempt to prevent this and a fight erupts. Three persons are injured and sent to the infirmary emergency room which has now been cordoned off by the FBI.

The local television stations report the scene on campus; the local CNN affiliate arrives and demands access to the hospital and the affected patients. Rumors about contagious diseases quickly spread, including charges that meningitis, Ebola virus, smallpox or measles have hit the campus. The FBI is reluctant to let anyone leave the building, partly on the theory that some of the infected persons might be perpetrators who accidentally have infected themselves in the course of aerosolizing the anthrax spores. After

an acrimonious conversation between the Texas Attorney General and the United States Attorney General, FBI agents are withdrawn and a cordon around the university infirmary is maintained by local police.

April 19-29: Over the next ten days anthrax cases are reported in a number of cities; there appears to be some link between audio equipment used by the White House and infections that present in each of the venues the president has visited since the beginning of the month. It is widely believed that the president and his family have been inoculated, but not the members of his Secret Service detail. A run on Ciproxin reduces commercially available levels of the inventory of this drug to negligible levels. When cases of anthrax infection begin to appear on Capitol Hill (the president had addressed a joint session of Congress only two weeks before), the Congress is put in recess.

April 30: That evening the President goes on television to inform the nation of the bioterrorist attack by unknown parties, perhaps linked to remnants of the al Qaeda network. He vows that the assailants will be identified and brought to justice; he urges cooperation with health authorities; and he announces the promulgation of an Executive Order that largely puts into effect the CDC-drafted Emergency Health Powers Act that apparently had been rejected by the Congress earlier that month. This Executive Order also purports to empower USAMRID[54] (the United States Army facility at Fort Dietrick) to manufacture Ciproxin and to distribute it as directed by the CDC. Because the Stafford Act requires that an emergency must cross state lines (and anthrax is not contagious) or lead to a request from a state governor before the president can act, it is generally agreed by all sides that, absent the Executive Order, federal officials are sharply restricted in their ability to respond to the attack.

May 1: Lawyers for Bayer, Inc. (the owners of the Ciproxin patent), the State of Texas, a number of insurance companies, HMOs and the ACLU seek injunctions in various jurisdictions. Three of these cases are consolidated and given an expedited hearing before the U.S. Supreme Court on May 15.

54. U.S. Army Medical Research Institute for Infectious Diseases

III. SIX OPINIONS AND THEIR AFTERMATHS

[The following excerpts of possible majority opinions of the U. S. Supreme Court are paired with public and political reaction to each opinion.]

THE TEXTUAL APPROACH

Nothing in the text of the Constitution explicitly authorizes the Executive to maintain the public health. Nor does the provision in Article II that locates the power of Commander in Chief in the President convey such authority, even in the face of an attack by a foreign entity (assuming this to be the case, which has in fact not been determined) because medical treatment and prevention *per se* are not acts appurtenant to the prosecution of a belligerency. The enemy will not be defeated or deterred by the treatment of those persons who are already infected. If the President has the power to enforce the provisions of the Executive Order it must be owing to the Constitutional obligation that he take care that the laws are faithfully executed. Because the Congress refused to pass the Emergency Health Powers Act, there is no such law for him to enforce. Therefore his action is unlawful because it is unauthorized.

The timely rendering of a Supreme Court opinion relying on this rationale caused the President to call Congress into an emergency, virtual session linking all members via videoconferencing, e-mail bulletin boards, and encrypted voting. The resulting legislation was somewhat narrower in some respects than the overturned Executive Order (for example, it set up special virtual tribunals that had to be satisfied before quarantines could be ordered) and somewhat broader in other aspects (for example, it provided for compensation to drug companies and HMOs).

As a result there was far less disturbance in the public and more acceptance of the government's actions. The unity of Congressional action with the immense prestige of a Court that defied an apparent emergency in order to preserve the Constitution was commented on by many; doubtless this legitimation accounted for the public consensus that supported federal action. By summer most Americans had been vaccinated for anthrax. No new cases had been reported. The terrorists were not yet identified.

THE STRUCTURAL APPROACH

The Constitution provides for an Executive power, even if in rather general terms. These terms permit—and actually require, as a practical matter—that a concert of the dispersed authorities among the various branches be achieved in order for lawful action to take place. This results in a certain relativity (rather than absolute power): presidential authority is greatest when it is in harmony with the Congress, less so otherwise. In the present case, there being no statute in place, we must decide whether the President has acted in defiance of a considered Congressional decision not to grant him statutory authority, or whether the situation is sufficiently changed so that, whatever we may conclude from Congress's failure to act, we may not say that that decision governs present circumstances. To do otherwise would allow the acts of terrorists to preclude any effective Congressional action in response to the terror they have wrought.

No penance would ever expiate the sin against free government of an unelected court's holding that wanton terror could effectively emasculate the power to protect our people. The Constitution is not, after all, a suicide pact. Until the Congress shall have the opportunity to consider legislation in light of current circumstances we cannot find that the President's actions are in conflict with Congress's will. Rather they exist in that twilight of concurrent powers. Here, as in the case of Lincoln's suspension of habeas corpus at the time of the Civil War, and Jefferson's purchase of Louisiana, we must assume that Congress will ratify these acts promptly when it has an opportunity; should it choose to do otherwise, a different case would be presented to us, which we would decide at that time.

This opinion buttressed the president's authority though, because it came so close to the 2004 elections, it did nothing to enhance the prestige of the Court itself. The fact that the Court did not even address the federalism issues arising from its own recent precedents[55] *which might have suggested that even Congress's authority, had it chosen to exercise it, would have been exceeded by the provisions of the Executive Order tended to detract from the respect accorded the opinion and its authors (at least among law professors and other judges.)*

55. See, e.g., *United States v. Lopez*, 514 U. S. 549 (1995); *United States* v. *Morrison*, 529 U.S. 598 (2000).

Nevertheless, on the crucial issue of public safety and order, the opinion checked an unraveling situation in the states where some officials contended that anthrax inoculations were, statistically, more threatening to public health than the receding risk flowing from the terrorist attacks. These officials were now routinely enjoined from interfering with federal action and much friction was thereby avoided.

THE PRUDENTIAL APPROACH

The Court finds itself called upon to balance two constitutional values: the explicit allocation to Congress of the lawmaking authority (assuming *arguendo* that this authority would support a statute empowering the president to promulgate the challenged Executive Order), and the implicit authority that the Executive protect the Commonwealth from mortal threats. If we were called upon to construe a statute that the president believed to provide authority on which he might rely to support the Executive Order—as the Solicitor General has intimated we might do with respect to a number of Congressional laws (including the Stafford Act, the legislation creating the CDC and that establishing the Department of Health and Human Services, *inter alia*)—we might well demur for we should not presume to undertake the Congress's role in fitting these laws more closely to our current, perilous situation. But we should never forget that it is a *constitution* we are expounding. Statutes are frequently revised in light of necessity but the Constitution is meant to endure crises; it is capable of being shaped by necessity without losing its essential character. Here the principle must be: the greater the threat to the survival of the society to whose protection the Constitution commits the Executive the greater the leeway that the Executive enjoys. Thus the burden shifts, and courts must not presume to usurp the President's role by determining the particular policies that necessity requires.

When the very existence of our way of life is imperiled by a lethal yet unknown enemy employing unseen agents both human and viral, the independent Executive authority is at its highest. To hold otherwise would make Congress itself a target of such agents, as appeared in the year 2001. We have no hesitation in confirming the President's power to issue the Executive Order challenged at bar; should circumstances change, there will be ample opportunity for the public will to be heard, through its representatives in Congress and in the electoral process.

The release of this opinion had an unexpected effect. With the courts effectively removed from the picture, when some regions began to complain that they were shortchanged in the allocation of vaccine and others that it was none of their affair and that their citizens should be relieved from undergoing vaccinations for what was a non-communicable disease there was no consensus to resolve these disputes. New reports of infections (largely erroneous) began to pour into the CDC. When the federal government announced that 90% of the available vaccine stocks had been distributed to the states but that only 15% of the population would be covered, demonstrations erupted in many cities. Wild conspiracy theories circulated, exacerbated by the failure to apprehend the perpetrators of the crime. When a well-known athlete died of a hemorrhagic infection, rumors circulated that a new biological attack was underway. Television commentators misinterpreted the technical statements of experts on the report and clinical descriptions of the Ebola virus filled the evening news. The White House and the CDC received dozens of calls from furious governors, mayors and health commissioners demanding to know why they were not informed of additional bioterrorist attacks using Ebola. Nurses, doctors, and hospital support personnel in health centers walked off their jobs; some were arrested pursuant to the Executive Order. Thousands of persons who had attended games in which the deceased athlete had played demanded treatment. HHS issued a press release explaining that the athlete had not had Ebola virus. The FBI affirmed that there was no reason to believe that a new attack using hemorrhagic fever virus was underway but the FBI also refused to rule out the possibility that there had been more than a single bioterrorist attack using anthrax.

THE HISTORICAL APPROACH

Delegates to the Convention in 1787 met in a city that had recently been struck by a violent and deadly infection. Philadelphia was the epicenter of a virulent outbreak of yellow fever. Houses with infected persons were required to fly red flags and these were so numerous that visitors to the city commented on them in letters home. Dolly Payne was free to meet and marry James Madison, the principal author of our Constitution, because she had been recently widowed by the yellow fever epidemic. Accordingly, we may be certain—as is rarely the case in constitutional interpretation—that if the framers and ratifiers had intended the federal government to take over the health

care system of the United States there would have been some mention of this intention.

Even if we were to assume that the president possessed the authority to act in advance of the Congress, the latter being in an enforced recess, he would not be empowered beyond that which the Congress could, constitutionally, provide. That power must flow from the Commerce Clause, yet even a cursory review of the intentions of the founding generation casts doubt on a construction of that Clause that would support the Executive Order.

The most persuasive evidence of the original purpose and scope of the Commerce Clause can be found in *The Federalist Papers*. There is nothing to suggest that this scope was intended to include the intrastate activities purportedly governed by the Executive Order. In *Federalist No. 42*, Madison emphasizes the key link between the regulation of foreign commerce and that among the states: Without the commerce power "the great and essential power of regulating *foreign commerce* would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter."[56] This clear intention provides no basis on which to regulate non-commercial intrastate activities. This intent is confirmed by *No. 45*:

> The powers delegated by the proposed Constitution to the federal government are few and defined. [They] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.... The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State.[57]

In the same Paper, Madison could scarcely have written, "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained"[58] if the health and domestic safety of the public were to be subsumed under this clause.

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56. Federalist 42 (Madison) in Robert B. Luce, ed., *The Federalist Papers* 247 (1976).

57. Federalist 45 (Madison) at 303 (cited in note 56).

58. Id.

Because the Executive Order is essentially regulatory in nature, it must stand or fall on this basis. And yet it is precisely this basis—which is reserved to the states—on which it cannot stand.

The effect of this ruling was cataclysmic. A frightened and wary public suddenly was told that it would take a constitutional amendment to protect them. Being Americans, they immediately decided to protect themselves instead. Several cities experienced outbreaks of civil unrest. News reports that the members of the Supreme Court had secretly been inoculated did nothing to enhance their prestige. The National Guard was called out in several states; the Court ended its term early, ostensibly on the grounds that it feared its chambers to be contaminated. The Democratic and Republican conventions, as well as sports events and other large meetings were canceled. In several states summer vacation for schoolchildren was moved forward. No community wished to invite the president and his entourage to visit. Small businesses in cities that depended on tourism failed; cities—which presented lucrative targets to terrorists—began to lose population. Irrationally, many persons refused to serve on juries or attend public meetings for fear of contracting infections.

But the greatest effect of the Supreme Court decision was overseas: other countries simply were astounded at the decision and their leaders concluded that the American constitution, which few abroad understood, crippled the U.S. from protecting itself against novel, 21st century threats. The dollar fell; alliances weakened; secret bargaining by other countries with anti-American terrorist groups took place in contexts that suggested extortion.

THE ETHICAL APPROACH

We begin, as we began, with the Declaration of Independence. Whatever doubts constitutional scholars once maintained about the relevance of the Declaration as constitutional law, it has become increasingly clear that that document is both incorporated by reference in the constitutional text (as by the 9th amendment,[59] for example) and is pervasive throughout the document taken as a whole. The Declaration provides the foundation on which the unique American theory of constitutionally limited government is constructed.

59. Charles L. Black, Jr., *A New Birth of Freedom. Human Rights, Named and Unnamed* (Putnam Publishing, 1997).

In its most famous passage the Declaration asserts that governments are instituted among mankind in order to secure mankind's rights to security, freedom and autonomy. All of these rights are threatened at this hour. The attacks on students, government employees and others in Austin and elsewhere were not directed at Texas *per se* or its institutions; these were merely the venue for a more grandiose atrocity. The goal of the killers who struck at the president's group was to render the security of *every* American questionable, precisely because the attacks were not aimed at any particular person; to restrain our freedoms by lashing them to that most pitiless of all masters, the human sense of fear; and to make of every day decisions (where to live, whether to have children, what associations to pursue) public acts dictated by distant, public enemies.

The President's Executive Order has been represented by counsel as a threat to American human rights but as the Declaration of Independence reminds us, it is those rights that impose upon the government the obligation to insure their protection. A government that was prevented from ensuring rights would be the adversary of human rights just as surely as if it were an oppressor. Viewed against these fundamental obligations imposed on government, and the assumption that where the People have given the government a task they must be presumed, in the absence of a contrary prohibition, to have also given the government the tools to carry out that task, we can find no infirmity in the Order. There is no prohibition, explicit or implicit, that would prevent such an Order. There is no human right to imperil others by refusing treatment of one's own person; to hold otherwise would imperil the basis for all rights. The Anti-Deficiency Act is sufficient to compensate whatever taking may be found to have occurred with respect to pharmaceutical products.

This opinion was greeted with relief in most quarters, excepting perhaps the country's law faculties. Congress was emboldened to begin oversight investigations. The FDA was accused by some members as having obstructed the development of vaccines on orders from the White House which, prior to April 1st, had been negotiating an arms control agreement on biological weapons. Congressional investigations of the FBI arose with the goal of enhancing the Executive's authority to collect intelligence on Americans as well as foreign persons. Congress voted funds to aid those states with the largest number of anthrax cases, paying for added public health personnel and overtime for police. All in

all, the Supreme Court opinion helped set in motion a certain sense that government was not the enemy of the society's well-being, as it was sometimes portrayed, but was an indispensable protector.

THE DOCTRINAL APPROACH

While there is no precedent directly on point, the guidance given us by a number of relevant cases, taken as a whole, clearly cannot sustain the president's Executive Order. Some cases affirming Executive authority, such as *Little v. Barreme*,[60] depend upon the Congress's ratification of the president's acts, either before (as in *Little*) or after the fact (as in *The Prize Cases*[61]). Some depend upon Congress's tacit ratification of presidential action by a long and unbroken record of acquiescence.[62] Of course no such acquiescence can be presumed in the instant case precisely because its incidence is so novel, even if horrifyingly so.

To be sure, there are cases holding that the president has inherent powers to protect the integrity of his office[63] or to protect the performance of federal duties.[64] And it is true that the vicious attacks that provoked the Executive Order were directed, to some degree, against the person and staff of the president himself. But no order as sweeping as the one at issue in this case could be supported on such narrow grounds. The federal government does not commandeer hospitals in Texas, or patents on drugs, simply to protect the president.

If there is a case whose context most resembles the one at bar, it is *Youngstown Sheet & Tube v. Sawyer*,[65] in which this Court held that a presidential order seizing the assets of certain steel mills was beyond the power of the Executive when the Congress had declined to provide direct and uncontrovertible authorization. Such authorization is not present here, where the scope of the Executive authority claimed is vastly greater.

Holding as we do that the president is without power to enforce the Executive Order, we need not consider whether, under

60. 6 U.S. (2 Cranch) 170 (1804).

61. 67 U.S. 635 (1863).

62. See *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915).

63. See *Myers v. United States*, 272 U.S. 52 (1926) (involving the subordination of an inferior executive officer to the direction of the president).

64. See *In re Neagle*, 135 U.S. 1 (1890), which involved an assault on a federal official, and *In re Debs*, 158 U. S. 564 (1895) (relating to protection of the mails).

65. 343 U. S. 579 (1952).

our recent commerce clause precedents, the Congress could validly adopt the various provisions of that Order as a statute.

The impact of this decision is hard to gauge. It thrust the Court—and its most conservative members—into the election of 2004 with one candidate for the presidency claiming that he would favor impeachment of the two most libertarian judges who, it was said, had put a doctrinaire laissez-faire philosophy ahead of the welfare of the country, while the incumbent whose Executive Order was struck down was forced to defend them. Because the bulk of the task of protecting society was successfully taken up by the private sector through insurance, the development of nanosensors, and enhanced commercial surveillance and information gathering on threats, the fears of new attacks abated. The locus of terrorist attacks moved overseas, at least for the time being.

IV. THE PURPOSE OF SCENARIO CONSTRUCTION

In Part Two of this essay I have tried to give, after the manner of Pessoa, different voices to different approaches to constitutional adjudication, and I have speculated what new worlds such voices might call into being. The point of such an exercise is not to predict the future; my speculations are far too contrived and too sketchy for that, in any case. Rather it is to sensitize the reader to the unpredictable and to dislodge, as far as I can, the insistence that any single approach is optimal.

CONCLUSION

Someday—sooner than we hope, later than we fear—constitutional decisions of the kind I have described will be upon us. Not only the Court but other constitutional actors, like the president, will have to make tragic choices in the face of great emotion, suffering and the imminence of death. I do not believe that there is a mechanics by which such choices can best be made—only a cultivation of the conscience by which these decisions ultimately are resolved. Exercises in the craft of the law are one means of such cultivation.